# DEBT COLLECTION

## EXECUTIVE'S NAME IN DUNNING LETTER VIOLATES FAIR DEBT COLLECTION PRACTICES ACT

Campuzano-Burgos v. Midland Credit Mgmt., 497 F. Supp. 2d 660 (E.D. Pa. 2007).

**Facts:** Plaintiffs each received debt collection letters from Midland Credit Management ("MCM") in 2006. Each letter was signed by J. Brandon Black, President of MCM or Ron Eckhardt, Executive Vice President. Neither executive had a role in the collection of the debts and were not aware that collection letters had been sent.

In early 2007, the plaintiffs filed a class action complaint alleging violations of the Federal Debt Collection Practices Act ("FDCPA"). At the Rule 16 conference the parties agreed to brief the question of statutory liability before addressing any class certification issues, and both filed a joint statement of stipulated facts and cross motions for summary judgment.

**Holding:** Plaintiffs' motion for partial summary judgment granted.

**Reasoning:** The FDCPA states that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt" 15 U.S.C. § 1692e(9). The court looked to *Brown v. Card Serv. Ctr.* where the appeals court directed future courts to "construe the language of the FDCPA broadly and to analyze letters such as these from the perspective of the least sophisticated debtor." 464 F.3d 450, 453 (3d Cir. 2006).

The standard used in determining if a letter is deceptive is if it can reasonably be read to have two or more different meanings and one is inaccurate. Because there was not any case law on point the court found a similar situation where the "FDCPA specifically bars the false representation or implication that any individual is an attorney or that any communication is from an attorney."

**An escalation from a lowly collection agent to a senior executive of the company could similarly demonstrate to a consumer that the debt collector means business.**

The court found that just like the attorney situation "an escalation from a lowly collection agent to a senior executive of the company could similarly demonstrate to a consumer that the debt collector means business." The court believed that it was no accident that MCM used the executives' names and titles on the letters and that MCM hoped this would be more likely to generate a response. In the attorney situation, a "debt collector may use the authority to prod a recalcitrant debtor to pay up, but only if the attorney is directly involved." The court held that the use of top executives' names and titles was likely to impress upon the debtors the seriousness of the communication, and convey that the executives had some actual involvement in the decision to send the letter and that was deceptive because they had no actual involvement in sending out the letter or collecting the debts.

## FAIR DEBT COLLECTION PRACTICES ACT NOTICE IN SUMMONS AND COMPLAINT DOES NOT VIOLATE ACT

Fed. Home Loan Mortgage Corp. v. Lamar, 503 F.3d 504 (6th Cir. 2007).

**FACTS:** Federal Home Loan Mortgage Corporation ("Federal Home") enlisted Lerner, Sampson & Rothfuss, L.P.A. ("LS&R") to institute mortgage foreclosure proceedings against Cynthia Lamar ("Lamar"). LS&R filed a summons and complaint in foreclosure against Lamar pursuant to the Federal Debt Collection Practices Act ("FDCPA"), which included a notice provision located immediately below the case caption and immediately above the complaint. Despite receiving notice that Lamar had been served by certified mail, LS&R failed to inform the process server who personally served Lamar with a second, albeit identical, summons and complaint two weeks later. Lamar answered the complaint and filed a third-party complaint against LS&R for violation of the FDCPA and the Ohio Consumer Sales Practice Act ("OCSPA"). She alleged that the notice of rights incorporated into mortgage foreclosure summons and complaint were inadequate and deceptive.

Both Lamar and LS&R moved for summary judgment on Lamar's FDCPA and OCSPA claims. The district court granted summary judgment in favor of LS&R. Lamar appealed the district court's ruling.

**HOLDING:** Affirmed.

**REASONING:** The court agreed with LS&R that Lamar's notices were neither inadequate nor deceptive, and that they did not violate the FDCPA. The court recognized that a deceptive notice was one that could reasonably be read to have two or more different meanings, one of which was inaccurate. The court also recognized that whether a notice was effectively conveyed must be determined under the "least sophisticated consumer" ("LSC") standard.

First, the court found upon a careful reading of the summons and complaint, the LSC would not be led to believe that they had 30 days to file, or did not have 30 days to dispute the debt, where the documents set out two different deadlines, without including reconciling language to spell out the fact that the deadlines were separate**.**

Second, the court found that where the notice is not difficult to read or to discern, the use of the same font and size does not cause the notice to be overshadowed by the rest of the document.

Third, the court found that the LSC would not be confused about when the 30-day period began when they were served twice, on separate days. The court explained, in the event of confusion, the first service would put the mortgagor on notice that they could contest the debt, and the second service would put them on notice that they should contact the law firm prosecuting the foreclosure proceeding.

Finally, the court found that the LSC would understand their right to challenge the validity of debt described, regardless of an error in the notice referencing "your rights under state law" rather than "under federal law."

**NO PRIVATE RIGHT OF ACTION FOR VIOLATION OF FEDERAL LAW GOVERNING WAGE GARNISHMENT**

Colbert v. Roling, 233 F. App'x 587 (8th Cir. 2007).

**FACTS:** Gregory Colbert brought an action under 42 U.S.C.A. § 1983 against officials of the Division of Child Support Enforcement of the Department of Social Services for the State of Missouri ("CSE"), alleging that their wage garnishment order was excessive and unlawful. Colbert argued that he had an individual right to bring claims under both the federal Social Security Act ("SSA") 15 U.S.C.A. § 1673 and the federal Consumer Credit Protection Act ("CCPA") 15 U.S.C.A. § 1601. He brought his action in federal district court.

The district court disagreed that these acts granted Colbert a private right of action, and dismissed his suit for lack of subject matter jurisdiction. Colbert appealed.

**HOLDING:** Affirmed.

**REASONING:** The court of appeals agreed with the district court, analyzing and rejecting each of Colbert's arguments. The court reviewed the issue *de novo* and addressed all legal aspects of the case.

The court noted that in order for Colbert to bring an action under section 1983, he "must assert the violation of a federal *right,* not merely a violation of federal law." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997).

The court then analyzed Colbert's claim that an individual right arose from Title IV-D of the SSA. They found that Colbert made only vague assertions as to violations of his rights by CSE. The court noted that while Colbert did mention the state's duties under 42 U.S.C.A. § 654(20)(A)-(B), that this statute did not create a private right of action, and in any case had only "aggregate focus" and thus could not be used to sustain an individual claim. Having analyzed this, the court stated "because Colbert has not "identif[ied] with particularity the rights [he] claimed" and the one provision he did mention does not focus on the individual interests of Colbert, he cannot bring a section 1983 claim based on an individual federal right under Title IV-D.

The court found that CSE's violation of state statute without more did not support a section 1983 claim. They also noted that Colbert had attempted to make a due process argument, but dismissed it because he linked the argument to the Eleventh Amendment without support.

Finally, the court considered Colbert's argument that he had a private right of action under the CCPA. "We have not directly determined whether there is an implied private right of action under 15 U.S.C. § 1673, a provision of Subchapter II of the Consumer Credit Protection Act." The court noted, however, that they had not found an individual right in another subchapter. They found that decision to be controlling over Colbert's claim, and, therefore, found no private right under 15 U.S.C. § 1673.

**FAIR DEBT ACT DOESN'T BAR COMMUNICATIONS WITH DEBTOR'S ATTORNEY**

Guerrero v. RJM Acquisitions LLC, 499 F.3d 926 (9th Cir. 2007).

**FACTS:** A debt collector sent the consumer two letters which informed him that they were the new creditors on a debt the consumer originally owed to another company. The consumer contacted his attorney who sent the debt collector a letter alleging violations of state law and the Fair Debt Collection Practices Act ("FDCPA") and threatened to sue the debt collector if it did not send payment as settlement. Upon receipt of the attorney's letter, the debt collector ceased all direct collection activity with the consumer and communicated only with the attorney. The appellate court found that because the two letters sent to the consumer were identical, they did not violate 15 U.S.C. § 1692g(a). The responsive letter from the debt collector to counsel, and not to the consumer, was not a prohibited collection effort.

**HOLDING:** Reversed and remanded.

**REASONING:** The court reasoned that a consumer and his attorney are not one and the same for purposes of the FDCPA. They are legally distinct entities and the FDCPA consequently treats them as such. For example, a debt collector who knows that a consumer has retained counsel regarding the subject debt may contact counsel, but may not generally contact the consumer directly, unless the attorney gives his consent. Subject to certain exceptions, a debt collector may not communicate in connection with a debt with "any person other than *the consumer, his attorney*, a consumer reporting agency . . ., the creditor, the attorney of the creditor, or the attorney of the debt collector." 15 U.S.C. § 1692c(b) (emphasis added). "Consumer" is defined broadly in section 1692c to include "the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator."

**A debt collector who knows how to contact a debtor's attorney must target all communications to the attorney, and not to the debtor himself.**

The court concluded that in approaching the debt collection problem, Congress did not view attorneys as susceptible to the abuses that spurred the need for the legislation to begin with, and that Congress built that differentiation into the statute itself. The court, analyzing section 1692c(a)(2), arrived at the same conclusion. Under that provision, a debt collector who knows how to contact a debtor's attorney must target all communications to the attorney, and not to the debtor himself. The rationale behind this rule is clear; unsophisticated consumers are easily bullied and misled, while trained attorneys are not.

**A MISREPRESENTATION IS ACTIONABLE WHETHER MADE TO THE CONSUMER DIRECTLY OR INDIRECTLY THROUGH HIS LAWYER**

Evory v. RJM Acquisitions Funding, 505 F.3d 769 (7th Cir. 2007).

**FACTS:** Judgments were entered in favor of debt collectors for four separate actions (*Lauer, Captain, Evory,* and *Jackson*) brought by consumers. The consumers alleged that the debt collectors had violated the Fair Debt Collection Practice Act ("FDCPA"). The Seventh Circuit Court of Appeals consolidated the cases and addressed the standard for determining misrepresentations made to lawyers.

The court of appeals addressed the four distinctive

cases and affirmed and reversed in part. In *Lauer*, the district court dismissed the complaint because the communication was made to the lawyer and the court declared the FDCPA inapplicable to communications made to a lawyer. In *Captain*, the debt collector improperly threatened to impose a penalty in a demand letter sent to the consumer. *Evory* and *Jackson* both involved settlements offers. In *Evory*, the district court dismissed the complaint, while the court granted summary judgment to the defendant in *Jackson*. The court affirmed the *Jackson* ruling and reversed the remaining three.

**The court concluded that representations that would be unlikely to mislead a competent lawyer should not be actionable.**

**HOLDING:** Affirmed in part and reversed and remanded in part.

**REASONING:** Section 1692e of the FDCPA states that a debt collector must not "use any false, deceptive, or misleading representation or means in connection with the collection of any debt." The court distinguished the standard of review when the representation is aimed at the lawyer as opposed to the client. In order to determine whether there was a violation, the court did not accept the "unsophisticated consumer" standpoint for discerning misrepresentations aimed at lawyers. This method was considered to be too lenient because most lawyers are knowledgeable about debt collection law, and those who are not familiar with the law ought to represent their clients competently by studying the applicable law. The court concluded that representations that would be unlikely to mislead a competent lawyer should not be actionable.

If the misrepresentation pertained to a false statement of fact, such as the amount of an unpaid balance, it may be actionable regardless of whether the statement is made to the client or attorney. Communications made to the consumer indirectly through his lawyer would be actionable. For example, the debt collector sent communication to the consumer's lawyer in *Lauer* threatening to dispose of property in violation of section 1692. The court of appeals reversed this decision, overruling the lower court because that communication sent to the attorney could not be deemed misrepresentation under the FDCPA. In *Jackson*, the appellate court upheld the district court's finding that the evidence did not show that the settlement offer was deceptive.

**DEBT COLLECTOR AND FIRM CAN BE SUED FOR IMPROPER VENUE**

Harrington v. CACV of Colo., LLC, 508 F. Supp. 2d 128 (D. Mass. 2007).

**FACTS:** The plaintiff, Michelle Harrington, resided in the Falmouth Judicial District, Massachusetts. The defendant debt collector, CACV, was incorporated in Colorado and the defendant law office, J. A. Cambece, was incorporated in Massachusetts. Harrington owed a debt to Fleet Bank which was subsequently purchased by CACV who hired Cambece to collect it.

The defendants filed a collection suit in Barnstable District Court, Massachusetts, despite having previously contacted Harrington at her home address. Harrington responded to the claim by certified mail, but the defendants moved for default, claiming she had not replied. The court granted the default. When Harrington informed the court she had responded, the defendants moved to vacate the judgment and the court complied.

Harrington moved for a change of venue to Falmouth, which the defendants did not oppose. She then moved to dismiss, as CACV had not registered with the Massachusetts Secretary of State as a foreign corporation. The trial court dismissed the defendant's suit with prejudice.

Harrington then filed suit against the defendants raising four claims, one of which was violation of the Fair Debt Collection Practice Act ("FDCPA") and Massachusetts General Laws chapter 93A for filing a suit in an improper venue. The defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

**HOLDING:** Defendant's motion to dismiss granted in part and denied in part.

**REASONING:** The court held that the FDCPA claim was time barred by the statute of limitations. However, it analyzed the chapter 93A claim under the substance of FDCPA because a violation of the federal statute is *per se* a violation of the state statute. The court found that, in substance, the defendants violated section 1692i of the FDCPA. The FDCPA requires a debt collector to file a collection suit against a consumer "in the judicial district or similar legal entity (A) in which such consumer signed the contract sued upon; or (B) in which such consumer resides at the commencement of the action."

The defendants argued that the Barnstable District Court was proper venue according to Massachusetts law. The court disagreed, finding that state venue laws are not determinative over FDCPA venue limitations. It cited several cases which rejected the defendant's argument that section 1692i "merely incorporates state venue provisions."

The congressional purpose for section 1692i was to prevent debt collectors from bringing suits in forums a great distance from the consumer's home. The court found that it would violate that intention if it accepted the defendant's argument. The court held the chapter 93A claim survived the motion to dismiss.

**COMPANY COLLECTING BOUNCED CHECKS FOR STATE ATTORNEY IS SUBJECT TO FDCPA**

Rosario v. American Corrective Counseling Services, Inc., 506 F.3d 1039, (11th Cir. 2007).

**FACTS:** Florida statutes authorize state attorneys to establish a bad check diversion program. The Twentieth Judicial Circuit State Attorney's Office ("SAO") contracted with American Corrective Counseling Services, Inc. ("ACCS"), a private company based in California, for ACCS to operate a Bad Check Restitution Program ("Program") on behalf of the SAO for the purpose of recovery of restitution for victims of non-sufficient funds and account-closed type checks. Plaintiffs each had a check referred to the Program and received notices and letters sent by ACCS on SAO stationery. The letters sought payment of the amount of the checks, plus fees of at least $125, including $75 for participation in an eight-hour educational class. The letters then stated that failure to participate may result in criminal prosecution by the SAO.

Plaintiffs allege that ACCS and various individual officers of ACCS have violated numerous provisions of the FDCPA and FCCPA. After discovery, plaintiffs moved for summary judgment on their claims, while defendants moved for summary judgment on grounds they were entitled to Eleventh Amendment immunity because they were agents or instrumentalities of the SAO, which is an arm of the state of Florida. The district court granted defendants' motion, dismissing the case without prejudice due to Eleventh Amendment immunity. Plaintiffs filed this appeal.

**HOLDING:** Reversed and remanded.

**REASONING:** The test that governs whether Eleventh Amendment immunity exists states that the factors to be considered are as follows: "(1) how state law defines the entity, (2) what degree of control the State maintains over the entity, and (3) from where the entity derives its funds and who is responsible for judgments against the entity." However, ACCS failed to meet each element of the above test. The statutory language and the language of the contract between ACCS and the SAO both specifically stated that ACCS is an independent contractor, not an agent. Further, SAO did not have control over the contents of the letters that ACCS sent. Finally, ACCS did not receive any funding from the state of Florida.

The most important factor in determining immunity is who is responsible for judgments against the entity. The ACCS contract specifically indemnified SAO except for situations involving the "sole negligence" of SAO employees. In short, ACCS was a private, for-profit corporation acting as an independent contractor to run a bad check diversion program for the SAO. Pursuant to Florida law, the ACCS contract, the actual operation of the bad check program, and Eleventh Circuit precedent, ACCS was not entitled to Eleventh Amendment immunity.

**LETTER ADVISING CUSTOMER TO PHONE FOR BALANCE DOES NOT VIOLATE THE FDCPA**

Williams v. OSI Educ. Servs, Inc., ____ F.3d ____ (7th Cir. 2007).

**FACTS:** Williams filed suit against debt collector OSI Educational Services, Inc., alleging violations of the Fair Debt Collection Practices Act ("FDCPA"). Specifically, she contended that information contained in a debt collection notice sent to her was not sufficiently specific as to her total debt, and did not meet the FDCPA's requirements. The district court granted summary judgment for OSI. Plaintiff appealed.

**HOLDING:** Affirmed.

**REASONING:** The court of appeals reviewed the summary judgment ruling *de novo*, assessing the facts in the light most favorable to the plaintiff. The letter sent by OSI contained the amount of the principal, interest, fees and a total amount due. Williams focused on the phrase: "the balance may not reflect the exact amount of interest which is accruing daily per your original agreement with your creditor. Contact us to find out your exact payout balance."

The court began its analysis by stating that "[t]he debt collector's letter must state the amount of the debt 'clearly enough that the recipient is likely to understand it.'" The court stated that the standard of review for the letter was an objective one, from the view of an "unsophisticated consumer or debtor." They noted that they had rejected the "least sophisticated consumer" standard, and instead reviewed the letter to see if it could confuse a substantial number of consumers or debtors.

Williams claimed that the phrasing of the letter in this case was more confusing than the one in *Chuway*. The statement in *Chuway* said "[p]lease remit the balance listed above in the return envelope provided. To obtain your most current balance information, please call [phone number]." The court found in the *Chuway* letter that the confusion arose because the letter did not state why the "current balance" would be different than the stated "balance." The plaintiff could have thought that "the reference to the 'current balance' meant that the defendant was trying to collect an additional debt [without] telling her how large an additional debt and thus violating the statute." The letter in this case created a sufficiently clear link between potential extra charges and the reason for those charges, the daily interest accrual.

**"The debt collector's letter must state the amount of the debt 'clearly enough that the recipient is likely to understand it.'"**

Williams' other two arguments were based on a specific reading of the letter in the present tense so that it might seem that the balance was actually lower than it appeared. The court rejected these arguments as a strained reading of the letter, and refused to consider a "bizarre" interpretation. Instead, they found that a common sense reading of the letter would be understood by a reasonable unsophisticated consumer or debtor. BecauseWilliams' sole evidence was the letter, the court affirmed the lower court's decision.